No. 85-1513

Supreme Court, U.S.
FILED
APR 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EDWIN W. EDWARDS, in his official capacity as Governor of Louisiana, WILLIAM W. GUSTE, JR., in his official capacity as Attorney General of Louisiana, LOUISIANA DEPARTMENT OF EDUCATION, and THOMAS G. CLAUSEN, in his official capacity as Superintendent of Education of Louisiana,

Appellants,

—v.—

DON AGUILLARD, LOUISIANA BOARD OF ELEMENTARY AND SECONDARY EDUCATION, ORLEANS PARISH SCHOOL BOARD *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION TO AFFIRM

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Question Presented

Whether the Court of Appeals properly struck down a Louisiana law entitled "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction" as violating the Establishment Clause of the First Amendment when incontrovertible facts, including the plain language of the statute, its legislative history and the historical background from which it emanated, all demonstrated that the purpose of the statute was to promote a religious belief ?[1/]

1/ A listing of the parties to the proceedings below is found in the appellant's Jurisdictional Statment at p. ii, n.1.

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No. 85-1513

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

EDWIN W. EDWARDS, in his official capacity as Governor of Louisiana, WILLIAM W. GUSTE, JR., in his official capacity as Attorney General of Louisiana, LOUISIANA DEPARTMENT OF EDUCATION, and THOMAS G. CLAUSEN, in his official capacity as Superintendent of Education of Louisiana,

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DON AGUILLARD, LOUISIANA BOARD OF ELEMENTARY AND SECONDARY EDUCATION, ORLEANS PARISH SCHOOL BOARD, et al.,

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MOTION TO AFFIRM

Appellees move, in accordance with Rule 16.1(c) of this Court's Rules, to affirm the judgment of the Court of Appeals for the Fifth Circuit. As we show, the questions on which the decision of this case depend are so unsubstantial as not to require briefs on the merits or oral argument for their resolution.

The judgment below was clearly correct. The Court of Appeals majority did no more than apply well-established doctrine concerning the Establishment Clause to undisputed facts.

STATEMENT OF THE CASE

Appellants' Jurisdictional Statement notwithstanding, this case, in the words of the Court of Appeals majority, "is a simple one, subject to a simple disposal: the [Balanced Treatment] Act violates the establishment clause

because the purpose of the statute is to promote a religious belief." (A-7).[1/]

The Parties

Appellees (plaintiffs below) include the Louisiana State Board of Elementary and Secondary Education, the Orleans Parish School Board, parents of school children residing in Louisiana whose education will be affected by the Balanced Treatment Act, teachers who must obey the Act, citizens and taxpayers of Louisiana whose tax money will go to finance the implementation of the Act, as well as religious leaders and leading scientific and educational organizations.

1/ References to the opinions below are to pages in the Appendices to the Jurisdictional Statement. The Court of Appeals panel opinion appears at 765 F.2d 1251, and the denial of rehearing en banc appears at 778 F.2d 225.

Appellants (defendants below) are the Governor, the Attorney General and the State Superintendent of Education of Louisiana, all in their official capacities, the State Department of Education and the St. Tammany Parish School Board (which has not participated in the suit).

The Act

Louisiana's Balanced Treatment Act, La. Rev. Stat. Ann. § 17:286 (West's 1982) (A-56-58), on its face, mandates a massive invasion of the curricula of the Louisiana public schools by a doctrine known as "creation-science." Although there are presently no "creation-science" textbooks or curriculum guides suitable for use in the public schools,[2/] the Act requires so-called

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2/ The absence of "creation-science" textbooks was conceded by counsel for appellants in his

(Continued)

"balanced treatment" for "creation-science" and "evolution-science" in classroom lectures, in textbook materials, "in library materials taken as a whole for the sciences and taken as a whole for the humanities," and, finally

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(Continued)

oral argument to the Court of Appeals. The absence of curriculum guides is self-evident from § 286.7 of the Act:

> "A. Each city and parish school board shall develop and provide to each public school classroom teacher in the system a curriculum guide on presentation of creation-science.
>
> "B. The governor shall designate seven creation-scientists who shall provide resource services in the development of curriculum guides to any city or parish school board upon request. Each such creation-scientist shall be designated from among the full-time faculty members teaching in any college and university in Louisiana. These creation-scientists shall serve at the pleasure of the governor and without compensation." (A-58).

> "in other educational programs in public schools, to the extent that such lectures, textbooks, library materials, or educational programs deal in any way with the subject of the origin of man, life, the earth or the universe." (A-56-57; emphasis added).

The Court of Appeals majority, after reading this plain language of the Act, had no difficulty in concluding that its

> "intended effect is to discredit evolution by counterbalancing its teaching at every turn with the teaching of creationism, a religious belief." (A-16).

Two other aspects of the plain language of the statute need to be noted. As the court below pointed out, the Act does not even "promote creation-science as a genuine academic interest," (A-15), since it "requires the teaching of the creation theory only if the theory of evolution is taught." (A-16). The Act thus seeks to achieve, albeit indirectly, what the Louisiana legislature could not otherwise accomplish -- a ban on the teaching of evolution in the public schools,

Epperson v. Arkansas, 393 U.S. 97 (1968).[3/] The

3/ Cf. McLean v. Arkansas Board of Education, 529 F. Supp. 1255 (E.D. Ark. 1982), declaring as violative of the Establishment Clause an Arkansas law virtually identical to the Balanced Treatment Act. The state did not appeal. On the possibility that many teachers in Arkansas would simply forego teaching evolution, the district court wrote in McLean:

> "Implementation of Act 590 will have serious and untoward consequences for students, particularly those planning to attend college. Evolution is the cornerstone of modern biology, and many courses in public schools contain subject matter relating to such varied topics as the age of the earth, geology and relationships among living things. Any student who is deprived of instruction as to the prevailing scientific thought on these topics will be denied a significant part of science education. Such a deprivation through the high school level would undoubtedly have an impact upon the quality of education in the State's colleges and universities, especially including the pre-professional and professional programs in the health sciences." 529 F. Supp. at 1273.

members of the Louisiana legislature were well aware of this possible outcome of their efforts -- though unlawful, some even thought it the preferred result.[4/]

Finally, the Act prohibits discrimination against any teacher "who chooses to be a creation-scientist or to teach scientific data which points to creationism" (A-57), but it contains no parallel provision prohibiting discrimination against teachers who choose to teach evolution theory.

4/ In legislative hearings, State Senator Keith, the sponsor of the Act, stated his "preference . . . that neither [evolution nor creationism] be taught." Pfeffer affidavit, Exh. A-11 at 52. The Pfeffer affidavit ("Pfeffer aff."), filed in the district court, has appended to it the complete legislative history of the Balanced Treatment Act.

The Historical Background

This case comes to this Court -- as it came to the courts below -- "against a historical background that cannot be denied or ignored." (A-7).

That historical background was succinctly set out by the majority opinion below, as follows:

> "[w]e must recognize that evolution has historically been offensive to religious fundamentalists because the theory cannot be reconciled with the Bibl l account of the origin of man. Nor can we ignore the fact that through the years religious fundamentalists have publicly scorned the theory of evolution and worked to discredit it." (A-13).

The court cited: Epperson, supra, 393 U.S. 97 (1968), striking down an Arkansas statute that made the teaching of evolution a crime; Crowley v. Smithsonian Institution, 636 F.2d 738 (D.C. Cir. 1980), rejecting an Establishment Clause challenge to the Smithsonian's display of exhibits on

evolution; McLean v. Arkansas Board of Education, 529 F. Supp. 1255 (E.D. Ark. 1982), striking down on Establishment Clause grounds an Arkansas statute virtually identical to the Balanced Treatment Act; and Wright v. Houston Independent School District, 366 F. Supp. 1208 (S.D. Tex. 1972), aff'd per curiam, 486 F.2d 137 (5th Cir. 1973), cert. denied, 417 U.S. 969 (1974), refusing to enjoin the teaching of evolution because it was allegedly a religious doctrine.

For a further discussion of the historical background, see McLean, supra, 529 F. Supp. at 1258-60.

The Legislative History

The Balanced Treatment Act was not the product of a public clamor by academics, or

scientists, or educators protesting a deficiency in the curricula of the Louisiana public schools. Its origins were more modest.

In 1980, a Louisiana State senator, Bill Keith,[5/] became concerned that, with science as taught in the Louisiana public schools, his son would abandon his belief that "God created the world and God created man," Pfeffer aff., Exh. A-4 at 22. He therefore introduced into the Louisiana legislature Senate Bill No. 956. The bill would have required the public schools to balance the teaching of the theory of evolution with the theory of "creation ex nihilo," which was defined to mean:

> "the belief that the origin of . . . life, of all the species of the plants and animals the origin of man and the origin of all things and their processes and relationship

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5/ Then-Senator Keith is no longer in the Louisiana legislature.

were created ex nihilo and fixed by God." (Pfeffer aff., Exh. A-1 at 1-2.)

Despite the patent unconstitutionality of this bill, the Louisiana legislature was not deterred from referring it to a legislative committee for further study.

In the meantime, one Paul Ellwanger, a respiratory therapist and the president of a South Carolina based organization known as Citizens For Fairness in Education, after hearing of Senator Keith's efforts on behalf of creationism, sent him a copy of a "model balanced treatment act" -- a proposed statute drafted by Ellwanger, who is neither a lawyer nor a scientist.

In the accompanying correspondence, Ellwanger wrote to Senator Keith, as follows:

> "I view this whole battle as one between God and anti-God forces, though I know there are a large number of evolutionists who believe in God.

* * *

> "[i]t behooves Satan do all he can to thwart our efforts and confuse the issue at every turn. (Pfeffer aff., Exh. D at 1.)

Ellwanger went further -- he emphasized to Senator Keith that the latter, in his legislative efforts in Louisiana, should downplay the support of the clergy for the Balanced Treatment Act:

> "It does the bill no good to have ministers out there in the public forum and the adversary will surely pick at that point . . . . Ministerial persons can accomplish a tremendous amount of work from behind the scenes, encouraging their congregations to take the organizational and P.R. initiatives. And they can lead their churches in storming Heaven with prayers for help against so tenacious an adversary." (Pfeffer aff., Exh. D at 1.)[6/]

The Ellwanger model bill, slightly altered and rearranged, was passed by the

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6/ The text of Ellwanger's letter to Senator Keith is quoted in McLean, supra, 529 F. Supp. at 1261.

Louisiana legislature as the Balanced Treatment Act.

In hearings before the legislature, the lead witness in support of the Balanced Treatment Act was Edward Boudreaux, a member of the Creation Research Society, an organization repeatedly identified by other witnesses as an authoritative source on "creation-science," Pfeffer aff., Exh. A-5, Pro Family Forum Statement at 3.

The Creation Research Society requires applicants for membership to subscribe to a statement of belief which, inter alia, includes the following:

> "(1) The Bible is the written Word of God . . . all of its assertions are historically and scientifically true in all of the original autographs. To the student of nature, this means that the account of origins in Genesis is a factual presentation of simple historical truths. (2) All basic types of living things, including man, were made by direct creative acts of God during Creation Week as described in Genesis." (McLean, supra, 529 F. Supp. at 1260, n.7.)

Appellants' Jurisdictional Statement makes no reference to these simple, but undisputed facts.

The complete legislative history of the Balanced Treatment Act, replete with numerous other references to the religious nature of "creation-science," was part of the record in the courts below. Virtually all of the materials and testimony offered in support of the Act were explicitly religious, either in their support of creationism or their attack on evolution.

For example, Senator Keith himself testified in support of the Act, stating, "[o]ur public school children are being molested by secular humanism. . . . The cardinal principal [sic] of religious humanism, secular humanism,

theological liberalism and atheistism [sic] . . . is evolution.[7]

Responding to criticisms that "creation-science" was not scientific, Senator Keith pointed to the Institute for Creation Research ("I.C.R."), as proof that scientists support creationism. The I.C.R. asserts as part of its purpose the "urgent need for our nation to return to belief in a personal omnipotent Creator, who has a purpose for his Creation. . . ."[8]

In its analysis of creationism, the Pro Family Forum, whose members gave testimony and submitted materials in support of the Act, described that doctrine as follows:

7/ Pfeffer aff., Exh. A-8 at 3.

8/ Pfeffer aff., Exh. A-5. Cf. McLean, supra, 529 F. Supp. at 1259-61 (I.C.R. is the "leading creationist organization")

> "The creation model postulates that all the basic systems of nature, including elements, stars, planets, life and the major kinds of organisms, including man, were created fully developed by super-natural creative processes during a primeval period of special creation, following which conservative (rather than creative) processes were established to govern the completed creation." (Pfeffer aff., Exh. A-5, Pro Family Forum Statement at 5.)

Given this legislative history, the pejoritive reference in the dissenting opinion below to the majority's "extra-record guess" as to "the steam which drove this enactment," (A-2), does not withstand analysis.

The Legislative Purpose

The stated purpose of the Balanced Treatment Act is "protecting academic freedom." (A-5). The Court of Appeals majority, giving due deference both to this stated purpose and to the state's right to prescribe the academic curricula of its public school systems, nevertheless

concluded that "[t]he Act does not and cannot, in reality, serve that purpose." (A-15). The court wrote:

> "Academic freedom embodies the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment. The principle of academic freedom abjures state interference with curriculum or theory as antithetical to the search for truth. The Balanced Treatment Act is contrary to the very concept it avows; it requires, presumably upon risk of sanction or dismissal for failure to comply, the teaching of creation-science whenever evolution is taught." (A-15; emphasis in original.)

The majority's conclusion is fortified by the fact that, prior to enactment of the Balanced Treatment Act, there was no Louisiana law which barred the teaching of "the truth," or of any aspect of scientific knowledge. Moreover, as the majority noted:

> "No court of which we are aware has prohibited voluntary instruction concerning purely scientific evidence that happens, incidentally, to be consistent with a religious doctrine or tenet." (A-15).

BEST AVA

Thus, the court's review of the plain language of the Louisiana statute convinced it that the Act "has no secular legislative purpose." (A-15).

The Proceedings Below

The District Court. After extensive prior proceedings, described in the majority opinion of the Court of Appeals at A-8-10, the district court granted plaintiffs' motion for summary judgment, reasoning that "creation science" necessarily entails teaching the existence of a divine creator, an inherently religious tenet.

The Court of Appeals. The original panel that heard defendants' appeal (Judges Brown, Politz and Jolly) unanimously affirmed.

Thereafter, defendants' petition for rehearing en banc was denied, but seven judges of

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the Fifth Circuit voted in favor of rehearing and filed a dissenting opinion written by Judge Gee.

The dissenters relied essentially on two propositions: (1) the Balanced Treatment Act did no more than require that the "whole truth be taught" in the Louisiana public schools -- a valid secular purpose; and (2) appellants' "uncontroverted affidavits" concerning "creation-science" established a scientific basis for the proposition that "there are two bona fide views." (A-3; emphasis in original).

The dissenting opinion is basically and irretrievably flawed, and raises no substantial issue for this Court to resolve, for the following reasons:

Before the passage of the Balanced Treatment Act, there was nothing in the law of Louisiana which prohibited the teaching of the "whole truth" -- in science, the humanities or any

other academic subject. As the majority wrote, "science instruction [does not] violate . . . the Establishment Clause merely because it 'happens to coincide or harmonize with the tenets of some or all religions.'" (A-15).

Hence, the real issue in this case is not whether defendants' after-the-fact, created-for-litigation affidavits establish that the doctrine of "creation-science" has a scientific component to it. For, as the majority clearly recognized, "the theory of creation is a religious belief," (A-13), and thus is not a "bona fide view" which can be taught in the public schools. The majority made that statement made with full recognition that:

> "We do not, indeed cannot, say that the theory of creation is to all people solely and exclusively a religious tenet. We also do not deny that the underpinnings of creationism may be supported by scientific evidence. (A-13).

But, in the final analysis, as the court wrote:

"It is equally true, however, that the theory of creation is a theory embraced by many religions." (A-13).

In short, defendants' "uncontroverted affidavits" were, and are, irrelevant to the issues in this case, and the dissenters' reliance on them was ill-founded.

THE MOTION TO AFFIRM SHOULD BE GRANTED

The majority decision below raises no substantial issue which requires further review by this Court.

The Establishment Clause forbids the passage of "laws which aid one religion, aid all religions, or prefer one religion over another," Everson v. Board of Education, 330 U.S. 1, 15 (1957). The test for determining whether state action violates the Establishment Clause was formulated by this Court in Lemon v. Kurtzman, 403

U.S. 602 (1971), and was most recently reaffirmed in Wallace v. Jaffree, 105 S. Ct. 2479 (1985):

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster 'an excessive government entanglement with religion.'"

Wallace, 105 S. Ct. at 2489-90; Lemon, 403 U.S. at 612-613.

The court below, in a carefully framed, well-reasoned opinion, applied this test -- with caution and deference to the right of the states "to proscribe the academic curricula of their public schools systems," acknowledging the "great care and restraint [needed to be exercised by the court] when called upon to intervene in the public schools." (A-10).

But, equally, the court below recognized that "the vigilant protection of the First

Amendment is nowhere more vital than in American public education." (A-11).

The court thus recognized that the Balanced Treatment Act would bring religious doctrine into the public school classroom in a fashion never before countenanced, or contemplated, by Establishment Clause precedent. The Balanced Treatment Act goes well beyond such matters as a moment of silent prayer or meditation in the public schools, or the posting of the Ten Commandments, or references to God in the Pledge of Allegiance or in the Declaration of Independence. Under the Act, an identified doctrine founded on the religious tenet of the existence, and active and repeated intervention, of an omnipotent creator becomes part of the established public school curricula -- taught to students on a regular, day-to-day basis, throughout the school day.

If the majority had wanted additional support for its conclusion, it could have relied on the Fifth Circuit's opinion in Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d. 1038, 1045 (5th Cir. 1982), cert. denied, 459 U.S. 1155 (1983):

> "Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. Thus symbolic reference is too dangerous to permit. (Emphasis in original.)

Moreover, the majority's analysis of legislative purpose was consistent with a long line of authority both in this Court and in the lower federal courts. See, e.g., Stone v. Graham, 449 U.S. 39 (1980); Karen B. v. Treen, 653 F.2d. 897 (5th Cir. 1981) aff'd mem., 455 U.S. 913 (1982); Lubbock Civil Liberties Union, supra, 669 F.2d 1038; McLean, supra. 529 F. Supp. 1255.

While the majority opinion below is in harmony with this Court's precedents, the dissenters below would jettison the "purpose" prong of the Lemon test. Thus, for purposes of argument the dissenters would concede that the "steam which drove" the Act "was generated by religious people . . . who wished the door left open to acceptance by these [public school] children of the Judeo-Christian religious doctrine of Divine Creation." (A-2). Nevertheless, say the dissenters, the Act does not infringe the Establishment Clause because the "tactic" chosen -- a law requiring that "the whole truth be taught" -- is constitutional. (A-2-3).

This is no more and no less than an absolute rejection of the "purpose" prong of the Lemon test. This Court has repeatedly held exactly the opposite: any statute enacted by a legislature which advances, endorses or promotes

sectarian religious doctrine in the public schools is without more a violation of the Establishment Clause, Wallace 105 S. Ct. at 2490; Lynch, 104 S. Ct. at 1368 (O'Connor, J. concurring.) (emphasis added).

Moreover, the majority followed an unbroken line of authority rejecting attempts to insert creationism into, or eliminate evolution from, the public schools. In addition to the cases cited earlier -- Epperson, Crowley, McLean and Wright, see pp. 9-10, supra, -- the list includes: Daniel v. Waters, 515 F.2d. 485 (6th Cir. 1975), striking down a statute mandating "commensurate attention" with evolution for other theories of origins, "including, but not limited to, the Genesis account in the Bible"; Hendren v. Campbell, No. 5577-0139 (unpub. op., Indiana Supp. Ct., April 14, 1977), banning the use, on Establishment Clause grounds, of a popular

creationist textbook in the Indiana public schools; and opinions of the Attorney Generals of the States of Oregon, Maryland and South Carolina finding that balanced treatment statutes proposed in those states violated the Establishment Clause.[9/]

There is no contrary authority.

Finally, the court below properly recognized that the Balanced Treatment Act was not born in a vacuum. In Lynch v. Donnelly, supra, 104 S. Ct. at 1369, Justice O'Connor, concurring, explained that "whether a government activity communicates endorsement of religion is . . . in large part a legal question to be answered on the

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9/ The Hendren opinion and the opinions of the Attorney Generals referred to in text are all appended to the Pfeffer affidavit. See Pfeffer aff., Exh. F, and Exhs. H, I and J respectively.

basis of judicial interpretation of social facts." Here, the "social facts" are not in dispute. If the Balanced Treatment Act does not communicate "endorsement of religion," it is difficult to imagine a legislative enactment that could so communicate.

The message has gotten through. In October 1981 the Louisiana Department of Education sent a questionnaire to the 66 Louisiana school superintendents to survey their knowledge of "creation-science."[10/] Question 3 of that questionnaire read:

> "Act 685 defines creation science as 'the scientific evidences for creation and inferences from those scientific evidences.' Based on this definition, how would you interpret creation-science?"

10/ The survey report, "Status Assessment: Act 658-Balanced Treatment For Creation-Science and Evolution-Science," is appended to the Pfeffer affidavit as Exhibit L.

Almost 40% (39.5%, to be precise) of the Louisiana school superintendents responding interpreted creation-science as "[t]he account of the creation of the universe and all living things as it is given in the Bible." An additional 34.9% interpreted creation-science as "[t]he argument that the universe was made by a creator but that more complex species continue to develop from simpler ones." Only 9.3% of the superintendents responding gave what the Board of Education had determined to be the appropriate "secular" answer. (Pfeffer aff., Exh. L at 6).

The courts below did not err in granting summary judgment. The state's affidavits did not raise genuine issues of fact with regard to the genuine legal issues in this case. No number of after-the-fact affidavits from "experts," none of whom is, or was, a member of the Louisiana legislature, can change the basic facts. Those facts

-- the law itself, its plain language, its legislative history, the social facts surrounding "creation-science" -- are not open to dispute. Appellants do not dispute these facts -- they simply avoid mentioning them. In these circumstances, the cases are clear that a trial is not required. See, e.g., Larson v. Valente, 456 U.S. 228 (1982); Lemon v. Kurtzman, supra, 403 U.S. 602 (1971); Stone v. Graham, supra, 449 U.S. 39 (1980); Epperson v. Arkansas, supra, 393 U.S. 97 (1968).

CONCLUSION

The motion to affirm should be granted.

Dated: New York, N. Y.
April 12, 1986

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

I, James P. McLoughlin, Jr., being sworn, state that on this 14th day of April, 1986, three copies of the appellee's Motion to Affirm in the above-captioned case were mailed, in envelopes properly addressed and first class postage prepaid, to counsel of record for all the appellants herein, and one copy to all other counsel herein, as follows:

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I further state that all parties required to be served have been served.

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Sworn to before me this
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_____